of both parties for new trial and for amendment of findings appears at pages 98 to 100 of the Record.

JURISDICTION

The judgment of the Court of Claims was entered December 2, 1935 (R. 97). Motions of both parties for new trial and amendment of findings were overruled June 1, 1936 (R. 98–100). The petition of the Shoshone Tribe of Indians for a writ of certiorari was filed July 22, 1936, and the cross-petition of the United States was filed September 1, 1936. Both petitions were granted on October 19, 1936. The jurisdiction of this Court is conferred by Section 1 of the Act of March 3, 1927, c. 302, 44 Stat., Part 2, page 1349, and by Section 3 (b) of the Act of February 13, 1925, c. 229, 43 Stat. 936, 939 (U. S. C., Title 28, Sec. 288).

QUESTIONS PRESENTED

The questions presented in this case may be summarized as follows:

1. Whether the placing of the Northern Arapahoes upon the Shoshone Reservation without the consent of the Shoshones and the continued maintenance of them there over the objection and protests of the Shoshones constituted an appropriation in 1878 of an undivided one-half of the Shoshones' interest in the reservation.

2. Whether the letter of August 13, 1891, from the Commissioner of Indian Affairs to the Wood-

ruff Commission constituted a "taking" as of that date as held by the Court of Claims.

3. Whether the passage of the Jurisdictional Act of 1927 and the bringing of this suit thereunder constituted an exercise of the power of eminent domain by the United States.

4. Whether the Act of March 3, 1883, conferred any rights upon the Shoshones for which they are entitled to recover compensation in this suit.

5. Whether the court below made an adequate allowance of compensation for the alleged temporary use and occupancy of the reservation by the Arapahoes from 1878 to 1891.

6. Whether the court below should have allowed compensation as for a temporary use and occupancy of the reservation by the Arapahoes for the periods from 1878 to 1891 and 1891 to 1927.

7. Whether the Shoshones should be allowed interest upon any compensation which they may be entitled to recover.

TREATY AND STATUTES INVOLVED

In the Appendix at pages 42 to 50, respectively, there are printed the Treaty of July 3, 1868 (15 Stat. 673), the pertinent portion of the Act of March 3, 1883, c. 141, 22 Stat. 582, 590 (U. S. C., Title 25, Sec. 155), and the full text of the Jurisdictional Act of March 3, 1927, c. 302, 44 Stat., Part 2, page 1349.

STATEMENT

The controlling facts of this case as shown by the record (pp. 31–68) are as follows:

On July 2, 1863, the United States and the Shoshone Tribe of Indians entered into a treaty (18 Stat. 685) by which a reservation of 44,672,000 acres of land located in Colorado, Utah, Idaho, and Wyoming was set apart for the Shoshones.

By a treaty of July 3, 1868, 15 Stat. 673, the Shoshones relinquished that reservation to the United States and the United States agreed (Art. II) that a certain tract of land, containing 3,054,182 acres, which is now within the State of Wyoming, should be and was thereby "* * * set apart for the absolute and undisturbed use and occupation of the Shoshone Indians herein named, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them; and * * * that no persons except those herein designated and authorized so to do, and except such officers, agents, and employees of the Government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall be permitted to pass over, settle upon, or reside in the territory * * *" set apart for the Shoshones. The Shoshones went upon the land immediately thereafter and have remained there ever since (R. 33, 36).

About October 1, 1877, a delegation of Sioux and Arapahoe Indians conferred with the President

and the Commissioner of Indian Affairs in an effort to arrange the location of their respective tribes upon some reservation. One Irwin, who had been an agent for the Shoshones but who was then the Indian Agent at the Red Cloud Agency, which had supervision over the Northern Band of the Arapahoe Indians, was present at the conference (R. 43, 44).

Afterwards, and on October 4, 1877, the Commissioner of Indian Affairs, with the approval of the Secretary of the Interior, authorized and directed Irwin to proceed at once to the Shoshone Reservation and to consult with the Indians there for the purpose of gaining their consent to the placing of the Northern Arapahoes upon the Shoshone Reservation with both tribes under one agent (R. 44). Irwin went to the Shoshone Reservation, held a council with the Indians there (R. 44–45), and then sent a telegram to the Commissioner of Indian Affairs at Washington dated Cheyenne, Wyoming, October 17, 1877, as follows (R. 45–46):

"I returned from Shoshone Agency today. Held council and made peace between Shoshones and Arapahoes."

The annual report of the Commissioner of Indian Affairs, dated November 1, 1877, stated in substance that in accordance with their request the Arapahoes had been given permission to join the Shoshones on their reservation, that the Shoshones in a formal council with Irwin had con-

sented to the arrangement and that the removal of the Arapahoes was then in progress (R. 74). As a matter of fact Irwin did not ask the Shoshones to agree to admit the Arapahoes upon their reservation, either temporarily or permanently, and up to the time of the institution of this suit the Shoshones never had consented to admit the Arapahoes as permanent occupants of their reservation (R. 45). The error in his annual report was called to the attention of the Commissioner of Indian Affairs as early as February 21, 1878, when one Patten, who was the agent for the Shoshones, wrote to the Commissioner and advised him that in the council with Irwin the Shoshones had not consented to admit the Arapahoes (R. 47), and the Court of Claims stated in its opinion that the trial record is replete with protests by the Shoshones against the presence of the Arapahoes upon their reservation from the time they were brought there in 1878 until the present (R. 73).

During the early part of 1878 the Arapahoes were being moved to the Shoshone Reservation under military escort (R. 47). On March 18, 1878, some of the Arapahoes arrived there without any previous knowledge on the part of the Shoshones of their coming, and their arrival caused considerable excitement among the Shoshones, resulting in demonstrations in the Shoshones' village which frightened the Arapahoes. On the same day Patten telegraphed the Commissioner of Indian

Affairs for immediate instructions. On April 2, 1878, the Commissioner replied and instructed Patten to "report fully by mail what other measures are necessary to locate the Band of Northern Arapahoe Indians under Black Coal" (R. 47). In the meantime the Arapahoes sent a delegation to the Shoshone Agency, where they met a number of the Shoshones and their Chief, Washakie. The Arapahoes explained to Chief Washakie that their horses and their traveling equipment were in bad condition; that many of their number were sick; and that for other similar reasons they were unable to travel. They also explained that they understood that the Government was preparing a reservation for them and that they would go there as soon as possible. Chief Washakie then informed the Arapahoe delegation that their tribe might come upon the Shoshone Reservation and remain there for a short time to rest and to feed their horses. The matter of the permanent settlement of the Arapahoes upon the Shoshone Reservation was not mentioned at that conference (R. 47, 48). By April 8, 1878, most of the Arapahoes were on the Shoshone Reservation (R. 48), and they have remained there and used and occupied the reservation and received the benefits of all facilities and services equally with the Shoshones ever since (R. 50). After the Arapahoes had camped upon the reservation, fed their horses, and been furnished with food and supplies by the agency for

several months, the Shoshone Tribe began to protest to the agent against their continued presence and such protests were continued and were mentioned from time to time in the reports of the Indian Agency to the Commissioner of Indian Affairs, but no action thereon was ever taken (R. 49).

Sometime before August 13, 1891, a Commission known as the Woodruff Commission was sent to negotiate on behalf of the United States with the Indians of the Shoshone Reservation for a cession of such part thereof as the Indians would cede. On August 5, 1891, the chairman of the Commission wrote to the Commissioner of Indian Affairs, asking for instructions as to how the Commission should treat with the Indians, inasmuch as Chief Washakie and the Shoshones denied that the Arapahoes had any rights to or upon the reservation. In reply the Commissioner of Indian Affairs, by a letter dated August 13, 1891, advised the Commission that "this office holds * * * that the Arapahoes have equal rights to the land on the said reservation which does not depend upon the further consent of the Shoshones, and you should conduct your negotiations with them upon that basis and with that understanding" (R. 50). The Commission continued its negotiations and obtained an agreement with the Indians, but that agreement was never ratified and the cession was never made (R. 52).

Subsequently, by agreement of April 21, 1896, approved June 7, 1897, c. 3, 30 Stat. 62, the Sho-

shones and the Arapahoes ceded to the United States 55,040 acres of the reservation for a consideration of $60,000. Again by agreement of April 21, 1904, approved March 3, 1905, c. 1452, 33 Stat. 1016, the Shoshones and the Arapahoes ceded to the United States a part of the reservation, containing 1,480,000 acres, which the United States agreed to dispose of for the account of the Indians belonging on the reservation. Each of these agreements contained a stipulation to the effect that nothing therein should be construed to deprive the Indians of any annuities or benefits to which they were entitled under existing agreements or treaty stipulations (R. 52, 53).

By the Jurisdictional Act of March 3, 1927, c. 302, 44 Stat. 1349, Congress conferred jurisdiction on the Court of Claims to hear, examine, adjudicate, and render judgment in any and all legal and equitable claims which the Shoshone Tribe might have against the United States arising under or growing out of the Treaty of July 3, 1868, or arising under or growing out of any subsequent treaty or agreement between the Shoshone Tribe and the United States or any subsequent Act of Congress affecting the tribe which had not theretofore been determined and adjudicated upon their merits by the Court of Claims or this Court. The Act also provided that any payment, including gratuities, which the United States might have made to the tribe should not operate as an estoppel but might be pleaded as an offset in the suit. Section 3 of

the Act also provided in part that "in reference to all claims which may be the subject matter of the suits herein authorized, the decree of the court shall be in full settlement of all damages, if any, committed by the Government of the United States and shall annul and cancel all claim, right, and title of the said Shoshone Indians in and to such money, lands, or other property" (R. 3). This suit was brought under that Act.

The Court of Claims held that the United States was liable for $332,475 as the fair and reasonable value of the use and occupation of the reservation by the Arapahoes from March 18, 1878, to August 13, 1891, and that on August 13, 1891, by the letter of the Commissioner of Indian Affairs to the Woodruff Commission the United States had "taken" an undivided one-half interest in the reservation and therefore was liable for the value of the interest "taken" as of the date of "taking" (R. 53; 74, 76). The court found that the fair and reasonable value of an undivided one-half interest of the Shoshone Reservation on August 13, 1891, was $2,050,579.50 (R. 53), based upon a valuation of $1.75 per acre (R. 79). The findings and the opinion show that this determination of value was based upon the facts that "it was known in 1891 that the Shoshone Reservation contained a large but undetermined quantity of coal, oil and gas, phosphate, and gypsum" (R. 53), and because it contained a large stand of excellent timber and a large area of fine grazing land from which con-

siderable revenue was derived from grazing leases (R. 38, 39, 79). The opinion shows that the court included these elements of value in fixing its award because of the Act of March 3, 1883, c. 141, 22 Stat. 582, 590, which provided in part that "the proceeds of all pasturage and sales of timber, coal, or other product of any Indian Reservation, * * *' and not the result of the labor of any member of such tribe, shall be covered into the Treasury for the benefit of such tribe under such regulations as the Secretary of the Interior shall prescribe; * * *'" (R. 79), and which the court regarded as making the Shoshones the "legal or beneficial owners of the mineral rights", timber, and pasturage, in addition to the rights given them by the Treaty of 1868 (R. 89; see also R. 78, 79, 81, 83, 87).

Against these and other items the court allowed offsets which left a balance due the Shoshones of $793,821.49 (R. 69), for which the court entered judgment (R. 97). Both parties filed motions for new trial and amendment of findings which were denied (R. 97, 100), and the case comes to this Court on cross-writs of certiorari.

SPECIFICATIONS OF ERRORS TO BE URGED BY THE UNITED STATES

The court below erred:

1. In holding that there was a "taking" by the Government of an undivided one-half interest in the Shoshone reservation for the benefit of the Arapahoes when the Commissioner of Indian Af-

fairs on August 13, 1891, advised the Woodruff Commission that the Arapahoes had equal rights in the reservation which did not depend upon the further consent of the Shoshones.

2. In not holding that the "taking" occurred in 1878 when the Arapahoes were removed by the Government to the Shoshone reservation without the consent of the Shoshones and thereafter maintained there over the continued objection and protest of the Shoshones.

3. In holding that the Act of March 3, 1883, granted the Shoshones an interest in and to the reservation in addition to those interests which were granted by the Treaty of 1868.

SUMMARY OF ARGUMENT

I

The letter of August 13, 1891, from the Commissioner of Indian Affairs to the Woodruff Commission did not constitute a "taking" in any sense because it was a mere expression of his opinion as to the legal effect of what had taken place thirteen years before. It was not intended to effect a "taking", and such "taking" as there is in this case had been completed in 1878, thirteen years before the letter was written.

The "taking", in the sense in which the Court of Claims used the term, was complete in 1878 when the Commissioner of Indian Affairs failed to remove the Arapahoes from the Shoshones' reservation, although he had full knowledge of the

fact that the occupancy of the Shoshones' reservation by the Arapahoes was being continued without the consent of the Shoshones and over their protests in violation of the Treaty of 1868.

The legislative history of the Jurisdictional Act in this case shows that it should be construed as permitting the Shoshone Indians to sue in the Court of Claims, upon the conditions that if they should so elect and the Court of Claims should find that there had been any unlawful appropriation of their reservation or any part thereof, it should award the Shoshones the value of the land appropriated as of the time of the appropriation but without interest thereon, and that the decree of the court should cancel and annul the right and title of the Shoshones to the lands so appropriated unlawfully.

The contention of the Shoshones that the Jurisdictional Act should be construed as depriving them of an interest in their reservation through the exercise of the power of eminent domain is without merit because (1) the Act permits the Shoshones to elect to preserve their rights and title without impairment by declining to sue, (2) the Act contains provisions which, if included in an Act exercising the power of eminent domain, would be unconstitutional, and (3) Section 3 of the Act provides that the "decree of the court shall be in full settlement of all damages, *if any*", which clearly indicates that Congress had no idea that it was creating an obligation on the part of the

United States although an obligation to pay "just compensation" necessarily results from the exercise of the power of eminent domain.

If the legislative history of the Jurisdictional Act be disregarded it is impossible to give meaning to that part of the Act which provides that the "decree of the court * * * shall annul and cancel all claim, right, and title of the said Shoshone Indians in and to such money, lands, or other property" and the effect of the Jurisdictional Act is limited to providing a forum for the adjudication of preexisting claims. If the Act be so construed, the Shoshones would be entitled to recover only for actual damages which they sustained by reason of the violation of the Treaty of 1868. There are no findings of the court below from which it can be ascertained what damages, if any, the Shoshones sustained thereby.

II

It is clear from the language of the Act of March 3, 1883, that standing by itself and in the absence of other legislation it granted to the Shoshones no greater rights in the timber, minerals, and other products of their reservation than they had under the Treaty of 1868. If there were any possible doubt as to the correct construction of that Act, consideration of the circumstances surrounding its passage makes it clear that Congress did not intend it to operate as a grant. The most that can be said in support of the contention that the Act operated

as a grant is that its language is ambiguous, but it is well-settled that it is enough to deny the contention if upon considering the Act the mind rests in doubt and uncertainty as to whether a grant was intended. Later legislation shows that Congress did not understand the Act of 1883 as a grant. Moreover, it would seem that it was unnecessary for the Court of Claims to construe the Act of March 3, 1883, at all. If that Act did grant anything to the Indians, what it granted was obviously a gratuity, and under the Jurisdictional Act the United States is entitled to offset gratuities against any claims which the Indians may have against the United States. Therefore, it necessarily follows that any claim for the appropriation of the gratuity bestowed would be offset by its own value.

III

The discussion of the remaining points is too brief to require summarization.

ARGUMENT

I

THE LIABILITY OF THE UNITED STATES TO THE SHOSHONES IS LIMITED TO ONE-HALF OF THE VALUE OF THEIR INTEREST IN THE RESERVATION AS OF 1878, WITHOUT INTEREST THEREON

The Court of Claims held that by the letter dated August 3, 1891, from the Commissioner of Indian Affairs to the Woodruff Commission in which it was stated that "this office holds * * * that the Arapahoes have equal rights to the land on the

said reservation which does not depend upon the further consent of the Shoshones" (R. 50, 75), the United States "took" an undivided one-half interest in the Shoshone Reservation and thereby became liable to the Shoshones for the value of the estate taken as of the date of taking, but without interest.

Both parties to this suit agree that the Court of Claims erred in so holding but disagree as to the conclusion which it should have reached. The Government contends that the court erred in fixing the date of the letter to be the date of the "taking." The date of the "taking" is of primary importance in determining the measure of damages to be awarded.

The letter of August 13, 1891, from the Commissioner of Indian Affairs to the Woodruff Commission did not constitute a "taking" in any sense. The Arapahoes had been placed on the Shoshones' Reservation in 1878 and kept there for 13 years without the consent and over the protest of the Shoshones. The Commissioner of Indian Affairs had been fully aware of the facts and had ignored the protests which the Shoshones had been making for many years. The power and authority of the Commissioner of Indian Affairs had not been enlarged during the time the Arapahoes had been kept there. His letter altered no fact; it did not change in any way the situation which had then existed 13 years and which continues unchanged to the present. It did not purport to "take"—and

there is nothing to show that it was intended to "take"—any interest from the Shoshones. The absence of any intention to "take" is in itself sufficient to refute the holding that the writing of the letter effected a "taking." *Horstmann Co.* v. *United States,* 257 U. S. 138. The letter was nothing but a statement by the Commissioner of Indian Affairs of his opinion of what the rights of the parties had been and should continue to be, and that opinion was based upon facts which had occurred 13 years before.

Under the facts of this case the "taking" in the sense in which the Court of Claims used the term was complete in 1878 when the Commissioner of Indian Affairs, with full knowledge of the fact that the Shoshones had consented to only a temporary occupancy of their Reservation by the Arapahoes, kept the Arapahoes on the Reservation over the protests of the Shoshones (R. 47–50). Those facts, and not the opinion which was expressed by the Commissioner of Indian Affairs in his letter to the Woodruff Commission, deprived the Shoshones of the exclusive use of their Reservation, constituted a violation of the Treaty of 1868, and effected whatever "taking" or appropriation is involved in this case.

That Congress understood these facts as constituting the appropriation for which the Jurisdictional Act was designed to afford the Shoshones relief, is shown by the legislative history of the

Jurisdictional Act. In reporting on a bill known as S. 2301, which, after veto by the President, was altered to the form in which the Jurisdictional Act now appears, the Committee on Indian Affairs of the House of Representatives said (Rep. No. 1628, 69th Congress, 2nd Session, Cong. Rec., Vol. 68, Part 1, p. 625):

> Despite the fact that the United States expressly guaranteed to these Indians the uninterrupted use and occupancy of the reservation, and against the protests of the Shoshones of said Wind River Reservation in Wyoming, the northern band of the Arapahoes, under military escort, were moved upon said reservation in the winter of 1877–78.
>
> In order to disarm the Shoshones they were assured by the military authorities that the Arapahoes would be removed from the reservation the following year. Since then the Shoshones have frequently protested against *the alleged unlawful appropriation* of their reservation but have received no relief from the Government. On the contrary, the Government has allowed the Arapahoes upon the reservation and treated the funds claimed by the Shoshones as though they were the joint property of both tribes.
>
> The purpose of the bill is to permit the Shoshones to submit their claims for alleged appropriation of property to the Court of Claims, and your committee feels that in

> view of the strong showing made the bill should be enacted at an early date. [Italics ours.]

For those reasons we submit that if the Court of Claims was correct in holding that there has been a "taking", it was in error in holding that the "taking" was in 1891 instead of 1878.

Both parties to this suit are agreed that there was no authority in the Commissioner of Indian Affairs to deprive the Shoshones of any property rights either in 1878 or in 1891. The only way in which the Shoshones could lawfully have been deprived of the use and occupation of their reservation was through the exercise of the power of eminent domain, *United States* v. *Creek Nation*, 295 U. S. 103, 110; but the Government will not be deemed to have exercised that power merely because some unauthorized officer takes possession of property, *United States* v. *North American Transportation & Trading Company*, 253 U. S. 330, 333.

The only color of authority for a "taking" in any sense by the Commissioner of Indian Affairs was Section 463 of the Revised Statutes (U. S. C., Title 25, Sec. 2), upon which the Court of Claims apparently based its conclusion (R. 76, 77). That statute provides:

> The commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs and of all matters arising out of Indian relations.

If the decision of the Court of Claims is to be understood as construing that statute as authorizing the Commissioner of Indian Affairs to exercise the power of eminent domain over Indian lands, we submit that such construction does violence to the language of the statute and it would seem that such an interpretation was denied by this Court in *United States* v. *Creek Nation*, 295 U. S. 103.

Since the action of the Commissioner of Indian Affairs was without authority Congress could have repudiated it altogether, and it would have created no liability on the part of the Government except as a breach of the Treaty. *J. Ribas y Hijo* v. *United States*, 194 U. S. 315, 323; *United States* v. *North American Transportation & Trading Company*, 253 U. S. 330, 334.

It is submitted, first, that instead of repudiating the action of the Commissioner, Congress by the Jurisdictional Act provided in effect that the "taking" or appropriation in 1878 should operate as an offer to purchase as of the date of the appropriation and left the Shoshones free to accept or reject that offer, and, second, that by filing this suit the Shoshones have elected to accept the offer and are bound by their acceptance.

In Section 3 of the Jurisdictional Act of March 3, 1927, Congress provided that—

> In reference to all claims which may be the subject-matter of the suits herein authorized, the decree of the court shall be in full

> settlement of all damages, if any, committed by the Government of the United States and shall annul and cancel all claim, right, and title of the said Shoshone Indians in and to *such money, lands, or other property.* [Italics ours.]

This reference to "such money, lands, or other property" is the first and only reference in the Act to any money, lands, or other property, so that from the face of the Act it is impossible to determine to what money, lands, or other property that provision of the Act applies, and to give it meaning we must look elsewhere for aid in its construction. This Court has declared that in case of ambiguity it may turn for assistance to the legislative history of the statute, *Costanzo* v. *Tillinghast,* 287 U. S. 341, 345. The legislative history of this Act makes the Congressional intent clear. The 69th Congress passed a bill known as S. 2301, which the President vetoed on January 28, 1927. Sections 1, 2, 4, 5, 6, and 7 of the Jurisdictional Act under which this suit was brought are identical with Sections 1, 2, 5, 6, 7, and 8 of that Bill. Sections 3 and 4 of that Bill provided (Cong. Rec., Vol. 68, Pt. 2, p. 1791):

> SEC. 3. In said suit the court shall also hear, examine, and adjudicate any claims which the United States may have against said tribe, but any payment, including gratuities which the United States may have made to said tribe, shall not operate as an estoppel, but may be pleaded as an offset in such suit: *Provided, however,* That the

United States may interpose to such suit or action any and all pleas of defense, affirmative and negative, legal and equitable, which it may have thereto not herein specifically barred by the provisions of this Act.

SEC. 4. *If it be determined by the court that the United States, in violation of the terms and provisions of any law, treaty, or agreement, has appropriated or disposed of any lands, money, or other property belonging to the Indians, damages therefor shall be confined to the value of the money, lands, or other property at the time of such appropriation or disposal, together with interest thereon at 5 per centum per annum from the date thereof;* and with reference to all claims which may be the subject matter of the suits herein authorized, the decree of the court shall be in full settlement of all damages, if any, committed by the Government of the United States and shall annul and cancel all claim, right, and title to the said Shoshone Indians in and to such money, lands, or other property. [Italics ours.]

The meaning of that bill was clear. It dealt with *appropriations*[1] of moneys, lands, or other property "in *violation* of the terms and provisions of any law, treaty, or agreement * * *" and provided expressly that "the *decree of the court* * * * shall annul and cancel all claim, right, and title of the said Shoshone

[1] The meaning of the term "appropriations" is made clear by the report on the Bill made by the House Committee on Indian Affairs, *supra*, p. 18.

Indians in and to such money, lands, or other property" so appropriated, and that the damages awarded by the decree should be confined to the value at the time of the appropriation and not at the date of the passage of the Bill. Since only the decree of the court would have annulled and cancelled any right or title of the Shoshone Indians, it is obvious that their rights and title could have been preserved by a refusal to bring suit, but by electing to take advantage of the benefits conferred upon them by the Bill they would have bound themselves to accept likewise the conditions imposed upon such acceptance, which included the annulling of their title and the limitation of the award to the value of the lands appropriated as of the date of the appropriation.

The fact that the Indians were given an election in the matter is sufficient to refute any contention that the vetoed bill was designed or intended to be an exercise of the power of eminent domain but there are other provisions which negate that contention even more conclusively. The Bill undertook to fix the compensation to be paid, which in eminent domain cases is a purely judicial function. It also provided that gratuities previously bestowed should be offset against the award, a procedure which clearly could not be followed in determining just compensation under the Fifth Amendment. Had Congress intended to exercise the power of eminent domain, those provisions would have been unconstitutional, *Monongahela Navigation Com-*

pany v. *United States,* 148 U. S. 312. When a statute may be construed in two ways, under one of which it would be unconstitutional and under the other constitutional, it is the duty of the courts to give it the construction which is constitutional. Therefore, the bill must be construed as having been intended merely to tender an offer to contract.

The President's veto message, *infra,* p. 53, stated in part that "the enrolled bill is objectionable because of the provision for the payment of interest from the date of origin of the claim * * *. It seems to me unreasonable to expect that the Government should be charged with interest from the dates of origin of such ancient claims. The amount of interest under the enrolled bill is several times greater than the amount of the principal. Such an interest policy would inevitably mean that issues supposed to have been placed in the way of fair determination by Jurisdictional Acts of the past will come forward again for additional interest settlements far exceeding the amounts of the original claims. *Should the item of interest be eliminated, I can now see no reason why the bill should not be approved* * * *." [Italics ours.] Because of the President's veto a bill known as S. 5523, which later became the Jurisdictional Act in this case, was drafted to meet the President's objection and referred to the Senate Committee on Indian Affairs. On February 4, 1927, the Com-

mittee reported (Senate Rep. No. 1389; Cong. Rec., Vol. 68, Pt. 3, P. 2921) as follows:

> This bill is a redraft of S. 2301, which passed both Houses of Congress but was vetoed by the President on January 28th last, because of the provision therein for the payment of interest from the date of origin of the claim. In his message the President stated should the item of interest be eliminated he could see no reason why the bill should not be approved. This bill was redrafted to correct the objection of the President *and is identical with S. 2301 except for the interest provision.* [Italics ours.]

With this statement the Committee recommended passage of the bill without amendment and it was so passed by both Houses and approved by the President. From that report it is obvious that it was the belief of the Committee that only the change indicated had been made and it is likewise obvious that Congress intended the new bill to have the same effect as the vetoed bill except for that change. As a matter of fact the Committee, in its effort to meet the President's objection, did more than merely omit the provision for the payment of interest; it deleted the provision of Section 4 that "If it be determined by the court that the United States, in violation of the terms and provisions of any law, treaty, or agreement, has appropriated or disposed of any lands, money, or

other property belonging to the Indians, damages therefor shall be confined to the value of the money, lands, or other property at the time of such appropriation or disposal, together with interest thereon at 5 per centum per annum from the date thereof"; and combined the remainder of that section with Section 3. The phrase "such money, lands, or other property" in S. 2301, the vetoed bill, referred to the provision in the first part of Section 4 of that bill regarding the appropriation or disposal of "any lands, money, or other property belonging to the Indians", and in the Jurisdictional Act, it must be understood in that sense if it is to be given any meaning whatsoever. In the light of its history it is clear that the purpose of the Act was not to take or to authorize the taking of any rights or property of the Shoshones against their will but simply to provide the Shoshones with a forum for the recovery of the value of such of their lands as had been unlawfully appropriated as of the date of the appropriation, if the Shoshones should elect to bring suit under the Act, as they have done.

This case is on all fours with that of *United States* v. *North American Transportation & Trading Company,* 253 U. S. 330. There, as here, the original entry was unauthorized and wrongful. There, as here, the unauthorized act was subsequently adopted as an offer to purchase. There, as here, there was no compulsory action by Congress or by anyone authorized by Congress. There, the the Secretary of War adopted the unauthorized

physical seizure of the land by his subordinate and this Court construed that adoption as an offer to purchase. Here, Congress adopted the unauthorized acts of officials of the Government and, by application of the same principle, Congress thereby offered to contract to pay the value of the "money, lands, or other property" which had been appropriated as of the date of the appropriation. By bringing this suit the Shoshone Indians accepted that offer and thereby a simple contractual obligation of the Government arose. It is too well settled to require discussion that the Government is not liable for interest on its contractual obligations unless the contract expressly provides therefor or some statute authorizes the payment of interest, neither of which conditions exists here.

The principles involved here and in the *North American Transportation and Trading Company* case are clearly distinguishable from those involved in *Seaboard Airline Railway Co.* v. *United States,* 261 U. S. 299; *Liggett & Myers Tobacco Company* v. *United States,* 274 U. S. 215; *Jacobs* v. *United States,* 290 U. S. 13; *Phelps* v. *United States,* 274 U. S. 341, and similar cases. In all of those cases the original appropriation was rightful because in pursuance of statutory authority previously conferred, while in this case and in the *North American Transportation and Trading Company* case the original appropriation was wrongful. It was upon this ground that this Court distinguished the *North American Transportation*

and Trading Company case from the *Jacobs* case, 290 U. S. 13. In the *Seaboard Airline* case and others of its kind the property of the plaintiffs was taken by Governmental action and the United States was bound by the Constitution to make just compensation. In this case, as in the *North American Transportation and Trading Company* case, the original appropriation created no liability, constitutional or contractual, on the part of the Government and Congress was free to repudiate it or adopt it on such terms and with such conditions as it saw fit to impose: It could have adopted the original appropriation as a forcible taking from the Shoshones against their will in the exercise of the power of eminent domain, *Crozier* v. *Friederich-Krupp Aktiengesellschaft,* 224 U. S. 290, but it clearly refrained from such action. Instead, Congress chose to treat the appropriation as an offer to contract and nothing more, and therefore the United States is liable only under that contract and not under the Fifth Amendment. *United States* v. *North American Transportation Trading Company,* 253 U. S. 330, 335.

The contention of the Government as to the effect of the Jurisdictional Act is compelling when the effect of the only other possible construction of that Act is considered. If the legislative history of the Act is disregarded, the clause in Section 3 of the Jurisdictional Act, "In reference to all claims which may be the subject-matter of the suits herein authorized, the decree of the court shall

be in full settlement of all damages, if any, committed by the Government of the United States and shall annul and cancel all claim, right, and title of the said Shoshone Indians in and to such money, lands, or other property," is utterly meaningless and must be disregarded entirely. The Act then would have the same effect as the Jurisdictional Acts in *Klamath Indians* v. *United States,* 296 U. S. 244, and *United States* v. *Mille Lac Chippewas,* 229 U. S. 498, in which cases this Court held that the Jurisdictional Act did nothing but provide a forum for the adjudication of pre-existing claims.

If this Act is construed as having that effect, the only cause of action which the Shoshones had and which is in question here is one based upon the violation of the Treaty of July 3, 1868. In such a cause of action the sole measure of damages is obviously that of actual damage sustained by the Shoshones, and there are no findings in the record in this case of any damage sustained by the Shoshones. The finding upon which the Court of Claims fixed the amount due the Shoshones for breach of the Treaty deals only with benefits derived by the Arapahoes and the United States from that breach (Finding 16, R. 53). That measure of damages would probably be correct in an action based upon a quasi-contract but clearly it is not applicable in this action for the breach of the Treaty.

Therefore, if the clause in question is given no meaning, the Shoshones are not entitled to recover for the appropriation of any interest in their reservation, and because there is no showing in the record that they have sustained any actual damage by reason of the breach of the treaty they are not entitled to recover on that account.

II

THE ACT OF 1883 DID NOT ENLARGE THE RIGHTS OF THE SHOSHONES IN THEIR RESERVATION

The Court of Claims held that by the Act of March 3, 1883, c. 141, 22 Stat. 590 (U. S. C., Title 25, Sec. 155), the Shoshones acquired "the legal or beneficial ownership" of the very valuable mineral, timber, and grazing rights in their reservation in addition to the right of exclusive use and occupancy which had been granted to them by the Treaty of July 3, 1868 (R. 78, 79).

Because of that holding the Court of Claims, in fixing its award for the undivided one-half interest which it held was "taken" from the Shoshones in 1891, considered as a major element of value the fact that "the Shoshones' reservation contained a large but undetermined amount of coal, oil and gas, phosphate, and gypsum" (R. 53), and so reached a figure of $2,050,597.50 as the value of the interest "taken." That figure was based upon a valuation of the Shoshones' rights in their reservation at the rate of $1.75 per acre (R. 79). The valuation of

the right of mere use and occupancy at anything even approaching that figure is inconceivable.

The Court of Claims also held that prior to the passage of that Act the Shoshones had nothing but the right to the exclusive use and occupancy of their reservation, and that that right did not carry with it any right, title, interest, or estate in the minerals, timber, or pasturage in the reservation, except for purposes incidental to occupancy (R. 89). Beyond doubt the court was right in that holding. *United States* v. *Cook,* 19 Wall. 591 (1873).

For that reason the Act of March 3, 1883, has no bearing upon this case if the Government's contention that the Shoshones are entitled to compensation as of 1878 is well-founded, but if the Court of Claims was correct in holding that the value of the interest of the Shoshones in their reservation as of 1891 is controlling, or if the Shoshones are correct in their contention that the value in 1927 is controlling, then the construction of that Act may be material.

That Act provided in part that "* * * the proceeds of all pasturage and sales of timber, coal, or other product of any Indian reservation, except those of the Five Civilized Tribes, and not the result of the labor of any member of such tribe, shall be covered into the Treasury for the benefit of such tribe under such regulations as the Secretary of the Interior shall prescribe; and the Secretary shall report his action in detail to Congress

at its next session." The language of that Act is clear. It merely gave the Indians a prospective interest as a gratuity in the proceeds of the sale of the products referred to therein, but before the Act could become operative the removal and sale of the timber, coal, and other products covered by the Act was necessary. The Act did not authorize any such removal or sale. It merely directed the disposition of moneys, if, as, and when any products of the reservation were severed from the soil and sold under proper authority and the proceeds of the sale were actually received. There was no such authority prior to August 13, 1891, which the Court of Claims held was the date upon which the "taking" was effected by the letter from the Commissioner of Indian Affairs to the Woodruff Commission. The Act of 1883 standing by itself and in the absence of other legislation gave the Shoshones no greater right in the timber, minerals, and other products of the reservation than they had under the Treaty of 1868.

If there were any possible doubt as to the correct construction of that Act, consideration of the circumstances surrounding its passage will aid in its construction.

In 1883 very extensive reservations comprising tens of millions of acres of land had been set apart for many tribes of Indians; most, if not all, of these reservations contained valuable stands of timber; many were known to contain large and rich mineral deposits which in this case, as in many others, were

of unknown extent and value (R. 51, 53). The timber and minerals alone on Indian reservations in existence at that time have proved to be worth many hundreds of millions of dollars.

The Act of March 3, 1883, is entitled, "An Act making appropriations to supply deficiencies in the appropriations for the fiscal year ending June thirtieth, 1883, and for prior years, and for those certified as due by the accounting officers of the Treasury in accordance with Section 4 of the Act of June fourteenth, 1878, heretofore paid from permanent appropriations, and for other purposes." In the official edition of the Statutes at Large it covers eighteen pages. The provision upon which the Court of Claims based its holding and upon which the Shoshones rely, covers just six lines in those eighteen pages. An intensive search of the records of Congress has not brought to light a single word of debate, any reference in the committee reports on that Act[2] or any other evidence that Congress gave the provision in question any consideration whatsoever.[3] Is it reasonable to suppose that Congress intended to give away, without

[2] 47th Cong., 2nd Session. House Rep. 1986, Cong. Doc. Series 2160; Senate Report, unprinted. Cong. Rec., Vol. 14, Pt. 4, pp. 3582, 3661; Conference Report, Cong. Rec., Vol. 14, Pt. 4, pp. 3693 and 3757.

[3] The provision in question here appeared for the first time as one of several amendments proposed by the Senate Committee on Appropriations, in its report on the Bill, which was made on March 3, 1883, in the closing hours of the last session of the Forty-seventh Congress. The Senate adopted the amendments proposed by the Committee, the

receiving anything in return, such a tremendous part of the public wealth by an obscure provision in a deficiency appropriation Act, which no member of Congress deemed of sufficient importance to merit debate?

Construing the Act as a grant not only strains but does violence to its language and disregards the well-established principle that one who asserts private rights in property under legislative grant must, if he would establish them, come prepared to show that they have been conferred in plain terms, for nothing passes by the grant except it be clearly stated or necessarily implied, and it is enough to deny the privileges contended for if, upon considering the Act, the mind rests in doubt and uncertainty as to whether they are intended to be conferred. *Blair* v. *Chicago,* 201 U. S. 400, 463, 467; *Charles River Bridge* v. *Warren Bridge,* 11 Pet. 420.

It is apparent that Congress did not understand the Act of 1883 as conferring upon the Indian Tribe any title to the timber, minerals, or other products of the reservation, since by an Act of February 16, 1889, c. 172, 25 Stat. 673, it was provided that the President might from year to year in his

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Bill was returned to the House, which refused to concur in the Senate amendments, a Conference Committee was appointed, it met and reported to both Houses, the Conference Report was adopted, the Bill was sent to the President, and it was signed *all on the same day.* See Cong. Rec., Vol. 14, Pt. 4, pp. 3582, 3661, 3675, 3693, 3744, 3757, 3776.

discretion and under such regulations as he might prescribe authorize the individual Indians residing on reservations or allotments, the fees to which remained in the United States, to fell, cut, remove, sell, or otherwise dispose of the dead timber, standing or fallen, on such reservation or allotment for the sole benefit of the individual Indian or Indians performing the labor. This Act of 1889, it will be observed, did not authorize the utilization of the proceeds of sale for the benefit of the tribe as a whole, which would have been necessary had the Act of 1883 vested any title in the Indian Tribe to the timber, minerals, and other products of the reservation.

It has been suggested by counsel for the Shoshones that the Act of 1883 merely recognized rights which had existed previously. To support that proposition they rely strongly upon an opinion rendered by Mr. Justice Stone while he held the office of Attorney General, which is reported in 34 Op. A. G. 171. It is submitted that that opinion of the Attorney General is not an authority which supports their contention. In that opinion the question involved was "whether or not the general oil and gas leasing act is applicable to Executive Order Indian reservations." In his opinion (p. 180) the Attorney General said:

> If it were necessary here to decide between these opposing views [i. e., whether in 1924 the Indian tribes had a mere right to use and occupancy or the equivalent of

> a fee simple title to their reservation] I should incline strongly to the latter.

From the very language of the opinion it is apparent that the statement is only an expression of an inclination and not a ruling.

The contention of the Shoshones is clearly contrary to the holdings of this Court in *United States* v. *Cook*, 19 Wall. 591, and *Pine River Logging Company* v. *United States*, 186 U. S. 279, which this Court has followed in *Northern Pacific Railroad Company* v. *Lewis*, 162 U. S. 366; *United States* v. *D. & R. G. Railroad Company*, 191 U. S. 84; *United States* v. *Paine Lumber Company*, 206 U. S. 467. In the *Cook* case (p. 594) this Court held that "what a tenant for life may do upon the lands of a remainder-man the Indians may do upon their reservations, but no more." In following and applying that doctrine in the *Pine River Logging Company* case this Court held that "the Indians had no right to the timber upon this land other than to provide themselves with the necessary wood for their individual use, or to improve their land * * * *except so far as Congress chose to extend such right* * * *" (p. 290) [italics ours]. No plainer statement of the principles involved here could be made.

Moreover, it would seem that it was unnecessary for the Court of Claims to construe the Act of March 3, 1883, at all. If that Act did grant anything to the Indians, it must be admitted that what

was granted was a gratuity and the Jurisdictional Act under which this suit was brought provides in substance that the United States may offset any gratuities which it may have bestowed upon the Tribe against any claims which the Tribe may have against the United States. Therefore, it necessarily follows that any claim for the appropriation of the gratuity bestowed by the Act of 1883 would be completely offset by the value of that gratuity. As a matter of fact, if the Shoshones' contention is correct, the United States would have been entitled to an offset larger than the claim of the Shoshones, since between 1884 and 1927 much timber was cut and large quantities of minerals were removed, thereby greatly reducing the value of whatever was bestowed before it was retaken. The great bulk of the fund of $1,628,744.56 described in Finding 24 (R. 59) was derived from the sales of timber and minerals and consequently the value of whatever property might have been bestowed by the Act of March 3, 1883, had been diminished in 1927 to the extent of the value of the minerals mined and the timber cut.

III

THE CONTENTIONS URGED BY THE SHOSHONES WHICH HAVE NOT BEEN DISPOSED OF HERETOFORE ARE WITHOUT MERIT

The first six and the eighth and ninth assignments of error of the Shoshones, relating to the claim of "taking", are disposed of in the Govern-

ment's first point in this brief (pp. 15–30). However, lest there be any misunderstanding with regard to the Shoshones' second assignment of error which is that "The Court erred as a matter of law in not holding that the permanent taking of the Arapahoes' allotments and the undivided half interest in the tribal lands of the Shoshones' reservation occurred in 1927 upon the passage of the Jurisdictional Act herein and the filing of this suit by the Shoshone Tribe under said Act", it is deemed appropriate to reiterate briefly the points which refute that contention.

1. Under the Jurisdictional Act the rights of the Shoshones could be affected only by the filing of this suit. The necessity of this voluntary act on the part of the Shoshones clearly negatives any possibility of eminent domain being within the purview of the Act.

2. Properly construed, the Act prohibits the payment of "just compensation."

3. The Act provides for the offsetting of gratuities previously bestowed against the award, which cannot be done in the exercise of the power of eminent domain.

4. Section 3 of the Act provides in part that "the decree of the court shall be in full settlement of all damages, *if any,* committed by the Government of the United States and shall annul and cancel all claim, right, and title of said Shoshone Indians in and to such money, lands, or other property."

The phrase "if any" in that section clearly indicates that Congress did not intend to exercise the power of eminent domain by that Act.

The Shoshones' seventh assignment of error comprises three points; first, that the compensation allowed them for the use and occupancy of the reservation by the Arapahoes from 1878 to 1891 was inadequate (R. 53, 81–82), secondly, that the Court of Claims should have allowed them compensation for use and occupancy by the Arapahoes from 1891 to 1927, and, third, that in any event the court should have allowed compensation "together with such additions thereto as may be required to produce the present full equivalent of such compensation paid contemporaneously with said temporary use and occupancy. Interest at a reasonable rate is suitable measure by which to ascertain the amount which should have been added."

The first point obviously involves the determination of questions of fact, which, of course, are not subject to review in this Court. *Luckenbach Steamship Company* v. *United States,* 272 U. S. 533, 540.

The second point is without merit unless the Shoshones are correct in their contention that their title to an undivided one-half interest was taken by eminent domain by the Jurisdictional Act of 1927. It is submitted that it has been demonstrated that that contention is unsound.

To the third point presented by that assignment there are two answers: first, that the appropria-

tion occurred in 1878 and under the Jurisdictional Act the rights of the parties are fixed as of that date, and, therefore, the Shoshones are not entitled to any compensation whatsoever for the use and occupancy of the reservation thereafter; and, secondly, if the Shoshones are entitled to any compensation for use and occupancy of the reservation by the Arapahoes, their claim therefor must arise out of a breach of the Treaty of July 3, 1868, and the liability of the Government is simply for breach of contract. The Government is not liable for interest for breach of contract unless the contract expressly so provides, or some statute authorizes the payment of interest, neither of which conditions exist in this case. *United States* v. *North American Transportation & Trading Co.*, 253 U. S. 330.

The fallacy of this third point is established by the fact that the language of the assignment of error is merely a paraphrase of the language employed by this Court in *Seaboard Airline Railway Co.* v. *United States,* 261 U. S. 299, 306, stating the rule applicable in eminent domain cases. Both parties are agreed that the power of eminent domain was not exercised prior to 1927 and consequently rules applicable to the exercise of that power are not applicable to claims for damages arising before that time.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment of the Court of Claims should be reversed and the case remanded for further proceedings.

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DECEMBER 1936.

APPENDIX

TREATY BETWEEN THE UNITED STATES OF AMERICA AND THE EASTERN BAND OF SHOSHONEES AND THE BANNACK TRIBE OF INDIANS; CONCLUDED, JULY 3, 1868; RATIFICATION ADVISED, FEBRUARY 16, 1869; PROCLAIMED, FEBRUARY 24, 1869, 15 STAT. 673

ARTICLE 1. From this day forward peace between the parties to this treaty shall forever continue. The government of the United States desires peace, and its honor is hereby pledged to keep it. The Indians desire peace, and they hereby pledge their honor to maintain it.

If bad men among the whites, or among other people subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs at Washington City, proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and also reimburse the injured person for the loss sustained.

If bad men among the Indians shall commit a wrong or depredation upon the person or property of any one, white, black, or Indian, subject to the authority of the United States, and at peace therewith, the Indians herein named solemnly agree that they will, on proof made to their agent and notice by him, deliver up the wrong-doer to the United States, to be tried and punished according

to its laws; and in case they wilfully refuse so to do, the person injured shall be reimbursed for his loss from the annuities or other moneys due or to become due to them under this or other treaties made with the United States. And the President, on advising with the Commissioner of Indian Affairs, shall prescribe such rules and regulations for ascertaining damages under the provisions of this article as in his judgment may be proper. But no such damages shall be adjusted and paid until thoroughly examined and passed upon by the Commissioner of Indian Affairs, and no one sustaining loss while violating or because of his violating the provisions of this treaty or the laws of the United States shall be reimbursed therefor.

ARTICLE II. It is agreed that whenever the Bannacks desire a reservation to be set apart for their use, or whenever the President of the United States shall deem it advisable for them to be put upon a reservation, he shall cause a suitable one to be selected for them in their present country, which shall embrace reasonable portions of the "Port Neuf" and "Kansas Prairie" countries, and that, when this reservation is declared, the United States will secure to the Bannacks the same rights and privileges therein, and make the same and like expenditures therein for their benefit, except the agency house and residence of agent, in proportions to their numbers, as herein provided for the Shoshonee reservation. The United States further agrees that the following district of country, to wit: commencing at the mouth of Owl creek and running due south to the crest of the divide between the Sweetwater and Papo Agie rivers; thence along the crest of said divide and the summit of Wind River

mountains to the longitude of North Fork of Wind river; thence due north to mouth of said North Fork and up its channel to a point twenty miles above its mouth; thence in a straight line to headwaters of Owl creek and along middle of channel of Owl creek to place of beginning, shall be and the same is set apart for the absolute and undisturbed use and occupation of the Shoshonee Indians herein named, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them; and the United States now solemnly agrees that no persons except those herein designated and authorized so to do, and except such officers, agents, and employees of the government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the territory described in this article for the use of said Indians, and henceforth they will and do hereby relinquish all title, claims, or rights in and to any portion of the territory of the United States, except such as is embraced within the limits aforesaid.

ARTICLE III. The United States agrees, at its own proper expense, to construct at a suitable point on the Shoshonee reservation a warehouse or storeroom for the use of the agent in storing goods belonging to the Indians, to cost not exceeding two thousand dollars; an agency building for the residence of the agent, to cost not exceeding three thousand; a residence for the physician, to cost not more than two thousand dollars; and five other buildings, for a carpenter, farmer, blacksmith, miller, and engineer, each to cost not exceeding two

thousand dollars; also a schoolhouse or mission building so soon as a sufficient number of children can be induced by the agent to attend school, which shall not cost exceeding twenty-five hundred dollars.

The United States agrees further to cause to be erected on said Shoshonee reservation, near the other buildings herein authorized, a good steam circular saw-mill, with a grist-mill and shingle machine attached, the same to cost not more than eight thousand dollars.

ARTICLE IV. The Indians herein named agree, when the agency house and other buildings shall be constructed on their reservations named, they will make said reservations their permanent home, and they will make no permanent settlement elsewhere; but they shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and so long as peace subsists among the whites and Indians on the borders of the hunting districts.

ARTICLE V. The United States agrees that the agent for said Indians shall in the future make his home at the agency building on the Shoshonee reservation, but shall direct and supervise affairs on the Bannack reservation; and shall keep an office open at all times for the purpose of prompt and diligent inquiry into such matters of complaint by and against the Indians as may be presented for investigation under the provisions of their treaty stipulations, as also for the faithful discharge of other duties enjoined by law. In all cases of depredation on person or property he shall cause the evidence to be taken in writing and forwarded, together with his finding, to the Commis-

sioner of Indian Affairs, whose decision shall be binding on the parties to this treaty.

ARTICLE VI. If any individual belonging to said tribes of Indians, or legally incorporated with them, being the head of a family, shall desire to commence farming, he shall have the privilege to select, in the presence and with the assistance of the agent then in charge, a tract of land within the reservation of his tribe, not exceeding three hundred and twenty acres in extent, which tract so selected, certified, and recorded in the "land book" as herein directed, shall cease to be held in common, but the same may be occupied and held in the exclusive possession of the person selecting it, and of his family, so long as he or they may continue to cultivate it.

Any person over eighteen years of age, not being the head of a family, may in like manner select and cause to be certified to him or her, for purposes of cultivation, a quantity of land not exceeding eighty acres in extent, and thereupon be entitled to the exclusive possession of the same as above described. For each tract of land so selected a certificate, containing a description thereof, and the name of the person selecting it, with a certificate endorsed thereon that the same has been recorded, shall be delivered to the party entitled to it by the agent, after the same shall have been recorded by him in a book to be kept in his office subject to inspection, which said book shall be known as the "Shoshonee (eastern band) and Bannack Land Book."

The President may at any time order a survey of these reservations, and when so surveyed Congress shall provide for protecting the rights of the Indian settlers in these improvements, and may fix

the character of the title held by each. The United States may pass such laws on the subject of alienation and descent of property as between Indians, and on all subjects connected with the government of the Indians on said reservations, and the internal police thereof, as may be thought proper.

ARTICLE VII. In order to insure the civilization of the tribes entering into this treaty, the necessity of education is admitted, especially of such of them as are or may be settled on said agricultural reservations, and they therefore pledge themselves to compel their children, male and female, between the ages of six and sixteen years, to attend school; and it is hereby made the duty of the agent for said Indians to see that this stipulation is strictly complied with; and the United States agrees that for every thirty children between said ages who can be induced or compelled to attend school, a house shall be provided and a teacher competent to teach the elementary branches of an English education shall be furnished, who will reside among said Indians and faithfully discharge his or her duties as a teacher. The provisions of this article to continue for twenty years.

ARTICLE VIII. When the head of a family or lodge shall have selected lands and received his certificate as above directed, and the agent shall be satisfied that he intends in good faith to commence cultivating the soil for a living, he shall be entitled to receive seeds and agricultural implements for the first year, in value one hundred dollars, and for each succeeding year he shall continue to farm for a period of three years more, he shall be entitled to receive seeds and imple-

ments as aforesaid in value twenty-five dollars per annum.

And it is further stipulated that such persons as commence farming shall receive instructions from the farmers herein provided for, and whenever more than one hundred persons on either reservation shall enter upon the cultivation of the soil, a second blacksmith shall be provided, with such iron, steel, and other material as may be required.

ARTICLE IX. In lieu of all sums of money or other annuities provided to be paid to the Indians herein named, under any and all treaties heretofore made with them, the United States agrees to deliver at the agency house on the reservation herein provided for, on the first day of September of each year, for thirty years, the following articles, to wit:

For each male person over fourteen years of age, a suit of good substantial woollen clothing, consisting of coat, hat, pantaloons, flannel shirt, and a pair of woollen socks; for each female over twelve years of age, a flannel skirt, or the goods necessary to make it, a pair of woollen hose, twelve yards of calico, and twelve yards of cotton domestics.

For the boys and girls under the ages named, such flannel and cotton goods as may be needed to make each a suit as aforesaid, together with a pair of woollen hose for each.

And in order that the Commissioner of Indian Affairs may be able to estimate properly for the articles herein named, it shall be the duty of the agent each year to forward to him a full and exact census of the Indians, on which the estimate from year to year can be based; and in addition to the clothing herein named, the sum of ten dollars shall

be annually appropriated for each Indian roaming and twenty dollars for each Indian engaged in agriculture, for a period of ten years, to be used by the Secretary of the Interior in the purchase of such articles as from time to time the condition and necessities of the Indians may indicate to be proper. And if at any time within the ten years it shall appear that the amount of money needed for clothing under this article can be appropriated to better uses for the tribes herein named, Congress may by law change the appropriation to other purposes; but in no event shall the amount of this appropriation be withdrawn or discontinued for the period named. And the President shall annually detail an officer of the army to be present and attest the delivery of all the goods herein named to the Indians, and he shall inspect and report on the quantity and quality of the goods and the manner of their delivery.

ARTICLE X. The United States hereby agrees to furnish annually to the Indians the physician, teachers, carpenter, miller, engineer, farmer, and blacksmith, as herein contemplated, and that such appropriations shall be made from time to time, on the estimates of the Secretary of the Interior, as will be sufficient to employ such persons.

ARTICLE XI. No treaty for the cession of any portion of the reservations herein described which may be held in common shall be of any force or validity as against the said Indians, unless executed and signed by at least a majority of all the adult male Indians occupying or interested in the same; and no cession by the tribe shall be understood or construed in such manner as to deprive

without his consent any individual member of the tribe of his right to any tract of land selected by him, as provided in Article VI of this treaty.

ARTICLE XII. It is agreed that the sum of five hundred dollars annually, for three years from the date when they commence to cultivate a farm, shall be expended in presents to the ten persons of said tribe, who, in the judgment of the agent, may grow the most valuable crops for the respective year.

ARTICLE XIII. It is further agreed that until such time as the agency buildings are established on the Shoshonee reservation, their agent shall reside at Fort Bridger, U. T., and their annuities shall be delivered to them at the same place in June of each year.

ACT OF MARCH 3, 1883, CHAPTER 141, 22 STAT. 582, 590

* * * * *

The proceeds of all pasturage and sales of timber, coal, or other product of any Indian reservation, except those of the five civilized tribes, and not the result of the labor of any member of such tribe, shall be covered into the Treasury for the benefit of such tribe under such regulations as the Secretary of the Interior shall prescribe; and the Secretary shall report his action in detail to Congress at its next session.

THE JURISDICTIONAL ACT OF MARCH 3, 1927, C 302, 44 STAT., PT. 2, P. 1349

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That jurisdiction be, and is hereby, conferred upon the Court of Claims, with

right of appeal to the Supreme Court of the United States by either party, notwithstanding the lapse of time or statutes of limitation, to hear, examine, adjudicate, and render judgment in any and all legal and equitable claims which the Shoshone Tribe of Indians of the Wind River Reservation in the State of Wyoming may have against the United States arising under or growing out of the treaty of July 3, 1868 (Fifteenth Statutes, page 673), or arising under or growing out of any subsequent treaty or agreement between said Shoshone Tribe of Indians and the United States or any subsequent Act of Congress affecting said tribe, which claims have not heretofore been determined and adjudicated upon their merits by the Court of Claims or the Supreme Court of the United States.

SEC. 2. The claims of said tribe shall be presented by petition, subject, however, to amendment at any time. The suit under this Act shall be instituted or petition filed in the Court of Claims within three years from the date of approval of this Act. Such suit shall make the Shoshone Tribe of Indians of the Wind River Reservation in Wyoming party plaintiff and the United States party defendant. The petition shall be verified upon information and belief by the attorney or attorneys employed by said tribe to prosecute said claims under contract approved by the Commissioner of Indian Affairs and the Secretary of the Interior. Letters, papers, documents, and public records, or certified copies thereof, bearing upon the claims presented, may be used in evidence; and the departments of Government shall give the attorney of said tribe access to any such letters, papers, docu-

ments, or public records, and shall furnish certified copies of such thereof as may be deemed material.

SEC. 3. In said suit the court shall also hear, examine, and adjudicate any claims which the United States may have against said tribe, but any payment, including gratuities which the United States may have made to said tribe, shall not operate as an estoppel, but may be pleaded as an offset in such suit: *Provided, however,* That the United States may interpose to such suit or action any and all pleas of defense, affirmative and negative, legal and equitable, which it may have thereto not herein specifically barred by the provisions of this Act. In reference to all claims which may be the subject matter of the suits herein authorized, the decree of the court shall be in full settlement of all damages, if any, committed by the Government of the United States and shall annul and cancel all claim, right, and title of the said Shoshone Indians in and to such money, lands, or other property.

SEC. 4. Upon final determination of such suit or suits the Court of Claims shall have jurisdiction to fix and determine a reasonable fee, not to exceed 10 per centum of the recovery, together with all necessary and proper expenses incurred in preparation and prosecution of the suit, to be paid to the attorneys employed by said Shoshone Tribe of Indians, and the same shall be included in the decree and shall be paid out of any sum or sums found to be due said tribe.

SEC. 5. The Court of Claims shall have full authority by proper orders and process to bring in and make parties to said suit any or all persons

deemed by it necessary or proper to the final determination of the matters in controversy.

SEC. 6. A copy of the petition in such suit shall be served upon the Attorney General of the United States, and he, or some attorney from the Department of Justice to be designated by him, is hereby directed to appear and defend the interests of the United States.

SEC. 7. All amounts which may be found due and recovered for said tribe under the provisions of this Act, less attorneys' fees and expenses, shall be deposited in the Treasury of the United States to the credit of said tribe and shall draw interest at the rate of 4 per centum per annum from the date of the judgment or decree.

VETO MESSAGE RELATING TO THE ACT AUTHORIZING THE SHOSHONE TRIBE OF INDIANS OF THE WIND RIVER RESERVATION IN WYOMING TO SUBMIT CLAIMS TO THE COURT OF CLAIMS

Congressional Record (vol. 68, part 3, page 2414 (69 Cong., 2d Sess.))

To the Senate:

I am returning herewith Senate bill 2301, "An act authorizing the Shoshone Tribe of Indians, of the Wind River Reservation, in Wyoming, to submit claims to the Court of Claims," without my approval.

The Fort Bridger treaty of July 3, 1868 (15 Stat. 673), set aside a reservation for the Shoshone Indians and for such other tribes as the Shoshones might "admit amongst them," but also provided that no cession of any portion of the reservation should be valid unless a treaty for the purpose

should be signed by a majority of the male adult Indians of the Shoshone Tribe. Afterwards the northern band of Arapaho Indians were located on the Shoshone Reservation.

The Shoshone Indians claim that a majority of the male adult Shoshones did not sign a treaty agreeing to the cession to the Arapahoes of a portion of the reservation; that the consent, if any, given by the Shoshones to the location of the Arapahoes on the reservation was for temporary occupancy only, and that the Shoshones have from time to time asserted that they should be compensated for the land occupied by the Arapahoes.

It might be fair to say that these contentions may be disposed of, it seems to me, by the fact that in 1896 and 1904 reservation lands were ceded by agreements signed by both the Shoshones and the Arapahoes which provided that the moneys received therefor should be divided between the Shoshones and the Arapahoes. Congress ratified these agreements, and they were carried into effect. Still this objection might not be fatal.

But, aside from the question of the merit of the claim, the enrolled bill is objectionable because of the provision for the payment of interest from the date of origin of the claim. It had never been Government policy, prior to the Crow Indian jurisdictional act of July 3, 1926, to provide for the payment of interest from the date of origin of a claim. I am now satisfied that further departure from our former policy would be unjustified. It seems to me unreasonable to expect that the Government should be charged with interest from the dates of origin of such ancient claims. The amount of the interest under the enrolled bill is several

times greater than the amount of the principal. Such an interest policy would inevitably mean that issues supposed to have been placed in the way of fair determination by jurisdictional acts of the past will come forward again for additional interest settlements far exceeding the amounts of the original claims. Should the item of interest be eliminated, I can now see no reason why the bill should not be approved. But if interest is to be allowed on this claim, it will certainly result in an effort to reopen an endless number of claims which have already been settled.

CALVIN COOLIDGE.

THE WHITE HOUSE,
January 28, 1927.

U. S. GOVERNMENT PRINTING OFFICE: 1930